

No. 14331

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellee's brief fails to discuss numerous allegations of the complaint, makes inferences contrary to it and in favor of the government and propounds rules of law and cases that are wholly immaterial to this appeal.

These errors are as follows:

I. A. *The Railroad Did Not Acquire, Hold Or Use Its Right Of Way As Stated By Appellee*. (Appellee's Brief, p. 8-10).

The record does not support the statement that the Railroad had an easement over public lands pursuant to the Right of Way Act of March 3, 1875 (18 Stat. 482, 43 U.S.C. 934), and the assertion is erroneous in fact.

The complaint alleges that the right of way was "owned . . . by defendant United States," that it knew of the accumulated debris, "had the right to

abate the same or cause the same to be abated” and “had reserved the right to do so and had done so at various time previous thereto” (R. 8). The Complaint also alleges appellee knew the railroad was not operating with a follow-up patrol, but “did not require such a patrol . . . although it had reserved the right to do so and in the exercise of reasonable care it should have done so.” (R. 8).

These allegations do not sustain the inference that the railroad had an easement under the Act cited. Normal railroad easements do not give the grantor any rights to require the grantee to abate a nuisance or to enter and abate it if the grantee fails to do so or give the grantor any rights whatever as to the method of operation of the railroad.

Since the Act of 1875 is inapplicable, the cases construing the rights and duties arising under it are wholly immaterial. In the cases cited in appellee’s brief it was either stipulated or admitted by the pleadings that the Act applied.

B. At Common Law The Owner Of A Servient Estate Having A Right Of Entry To Repair Has A Duty To Third Persons To Exercise Such Rights. (Appellee’s Brief, pp. 10-13).

Assuming *arguendo* that the situation was a “bare easement,” as appellee alleges, the case of *Reed v. Allegheny Co.*, 330 Pa. 300, 199 Atl. 187—the only third party liability case cited—supports appellants. In that case, one injured as a result of a defect in a highway crossing of a railroad recovered against both the railroad and the county. The court reversed the verdict over in favor of the County against the railroad and remanded the action over for a new trial because there was no evidence to show any duty to maintain the crossing by

the railroad. *The plaintiff's verdict against both defendants was not disturbed.* The court said the duty to repair could be created (1) by statute, (2) by contract between the parties; and (3) by evidence of who "inspected the crossing and maintained it in repair over any long course of years."

In a subsequent decision, the Fifth Circuit has held that actual inspection and repair of a highway and railroad intersection by a railroad imposed liability upon it under Pennsylvania law, even though the right of way was actually owned by a separate but controlled corporation. *Conry v. Baltimore & O. R. Co.*, 209 F. (2d) 423 (CCA 3rd 1953).

In thus deciding the case upon the actual rights of the defendant in the property rather than upon any theoretical difference between the duties owed third parties under easements, leases, licenses or agency, the court was following the great weight of authority.

Hentz v. Toppin, 77 N. E. 2d 229, 322 Mass. 333 (1948) held the owner of a servient estate liable to a third person injured in using the easement as a result of faulty maintenance where the owner had merely reserved the right to repair.

This case is but an illustration of the rule that duties owed third persons with respect to the condition of premises depend upon the foreseeability of harm and the power of the defendant to obviate the danger.

"When the true basis for the liability of the lessor to persons outside the premises is understood, there can be no question but that the liability is the same whether the lessor covenants to repair or only reserves the right to enter to make repairs. The theory upon which a lessor is held liable in such cases is not that he is under any

affirmative contractual duty to such persons to make repairs, but that, by virtue of the covenant, the control of the premises continues in him. This power of control, being just as complete and efficacious where he only reserves a right of entry to make repairs as where he affirmatively covenants to repair, it is clear that, so far as the continuation of his liability is concerned, the nature of the covenant or agreement is immaterial." 89 A.L.R. 480, 484.

Appel v. Muller, 186 N.E. 785, 262 N. Y. 278 (Ct. App. 1933) held an owner liable upon the same theory of a duty to third persons outside the premises based upon the reservations of a power of control, saying at page 787:

"In this instance the lease contained no covenant by the landlord to make repairs for the tenant. It did contain a provision, however, reserving to the landlord 'the right to enter into and upon said premises, or any part thereof, and at all reasonable hours, for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof.' As we have seen, the only force which a covenant to repair has in such a case arises from the implication that what the landlord has covenanted to do, he has reserved the power to do. In this case a resort to implication is unnecessary, for the power to enter and make necessary repairs was expressly reserved. The reservation, therefore, has accomplished, by express words, all that the covenant to repair might have done through implication. The landlord, therefore, had never parted so completely with possession and control that he had disabled himself from performing his duty of care towards

the travelers upon the street. He continued under the duty to keep his building in a safe condition; he reserved the power to perform this duty; therefore he was liable."

The same rule is applied to an owner of land who hires an independent contractor. *Boggess v. King County*, 150 Wash. 578, 274 Pac. 188 held the County liable to a child injured by dynamite caps left by an independent contractor in the road near the customary route taken by children going to school. Liability was not predicateed upon any theory of absolute liability, but simply upon the knowledge of the county that the caps were left in the county road. The court said (at p. 589):

"This fact the agent of the county knew, or should have known. As inspector of that work for the county, ordinary prudence dictated that he should direct the contractors to provide a safe place to store such explosives, or take them away from the work when not in use."

So here, ordinary prudence dictated that Ranger Floe should direct the railroad to abate the fire hazard on its right of way or do so himself as he had done before.

Secondly, appellee has wholly ignored the allegations of the complaint that the United States negligently failed to require the railroad to use a follow-up patrol to extinguish fires, although it had reserved the right to do so and he knew the railroad was not so operating. By no inference can this allegation be equated to a normal easement.

Spokane v. Fisher, 106 Wash. 378, 180 Pac. 139 held a landlord liable for the negligence of a tenant's employee in operating a sidewalk freight

elevator because the court could not find that the landlord

“ . . . *had no rights of supervision, duty to keep in repair, control over the operation, or financial benefit from the heating plant and the trap-door which was necessary for its maintenance and operation.*” (at p. 383, emphasis supplied).

The court held that the burden was on the landlord to establish non-liability for negligent operation by a tenant by showing a term lease “which wholly divests him of any and all control over the premises.” (p. 382).

See also, *Northern Pac. Ry. Co. v. Mentzer*, 214 Fed. 10 (CCA 9th 1914) where this court held one railroad responsible for the negligent operation of another over its tracks, without consideration of whether the trackage agreement constituted a lease, license or easement.

In *United States v. The Australian Star*, 172 F. (2d) 472 (CCA 2d 1949) *cert. denied*, 338 U. S. 823, 94 L. Ed. 499, 70 S. Ct. 69, the court held a United States vessel was under a duty to warn two other ships of danger and to take affirmative action to prevent a collision when it knew that the two vessels were on a collision course and had the power and means to order at least one of them to change course.

Appellee's statement that the United States had no financial interest in the operation of the railroad is similarly without foundation in the record. Such an interest is not a necessary condition of liability, but rather a factor bearing on the right to exercise control.

C. Appellee Had Reserved A Right To Enter Upon The Right-of-Way And Abate Combustibles And

Therefore Had All Of The Incidents Of Ownership Of An Owner, Operator Or Person In Possession Of The Right-of-Way." (Appellee's Brief, pp. 13-16).

Under Washington law, the owner of property subject to an easement who retains free and unrestricted access to the easement to keep it clear of combustibles or to require the easement holder to do so has both a common law and statutory duty to do so.

Washington statutes regulating fire hazards and establishing duties of fire fighting do not distinguish between owners of dominant and servient estates. The clear intent of such statutes is to prevent "*any person*" from doing any act that endangers the forests (R.C.W. 76.04.450, Rem. Rev. Stat., §5818). They require that "the owner, operator or person in possession of land" shall extinguish fires after notice of existence of a fire thereon (R.C.W. 76.04.380, Rev. of Rem. Rev. Stat., §5806, (1945)).

Appellee's assertion that appellee had only a reversionary interest in the land and a right to prevent the railroad from using the land for other than railroad purposes and its comparison of appellee to the holder of a right of entry for condition broken or a contingent or vested remainder is erroneous and contrary to the allegations of the complaint. Appellee had a right of access to the right of way and a right to remove combustibles from it in every sense equal to the power of the owner of unencumbered land. In addition, it had a right to require the railroad to abate the combustibles. Hence, appellee had all of the rights of an owner with respect to the accumulation of combustibles on the right of way, plus the right to compel another to abate the hazard and had actually exercised those rights in the past. (R. 8).

No reason in law or logic suggest itself why appellee having all of the incidents of ownership required to comply with the statute should escape from it because a third person subject to its control also had the same powers.

II. A. *This Court Has Decisively Disposed Of Appellee's Argument That Liability For Negligence May Not Be Predicated Upon Violation Of Criminal Statute.* (Appellee's Brief, pp. 16-18).

In *Spokane International Ry. Co. v. United States*, 72 F. (2d) 440, 442 (CCA 9th, 1934), a railroad was held civilly liable to the United States under a statute imposing criminal liability for failure to keep a right of way "clear and free of all combustible and inflammable material."

This court pointed out that "This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another."

The court said such statutes "should not be construed to impose on defendant a standard of care impossible of fulfillment."

So here Appellant is not relying upon any theory of absolute liability based upon a criminal statute but upon negligence in observing the standard of care established by statute. The burden is upon appellee to show that the standard of care is impossible of fulfillment at the trial.

B. *The Rights, Duties And Liabilities As Between Appellee And The Railroad Are Immaterial In This Appeal* (Appellee's Brief, pp. 19-20).

Appellee again fails to cite any third party liability cases. Whether it be true or false that an adjoin-

ing landowner's recovery against the primary wrongdoer is defeated by his own negligence, it is irrelevant to the question of whether or not he is liable to third persons, where such negligence is a contributing cause of the spread of fire to lands of third persons.¹

C. The Complaint Clearly Alleges That Appellee's Violation Of The Statute In Causing An Accumulation Of Slashings Was A Proximate Cause Of The Damage. (Appellee's Brief pp. 21-22).

The complaint alleges in substance:

- (1) That the Forest Service had caused the accumulation of slashings in Section 31, (R. 15) which constituted a fire hazard in the Olympic Peninsula under the statute (R. 8-9).
- (2) That the fire spread into Section 31 (R. 13).
- (3) That as a proximate result of the negligence of the government in that respect, the property of the appellants was destroyed (R. 22).

Since these allegations must be construed in the most favorable light to the appellants and all doubts resolved in their favor, there is no question that they properly allege that the accumulation of slashings was at least a contributing cause to the spread of fire and appellants' damage.

III. A. *The Forest Service Acts In The Same Fashion*

¹That rule stated by appellee is not the law of Washington: *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (leaving property unprotected with full knowledge of fire is contributory negligence barring recovery). See also *Nashville C. & St. L. Railroad v. Nants*, 65 S. W. (2d) 189, 167 Tenn 1, and *Woolworth Co. v. Seattle*, 104 Wash. 629, 177 Pac. 664, where violation of a statute by the adjoining landowner contributing to the damage barred his recovery. In this case, of course, the act of appellees in causing an accumulation of slash on its land constituted a violation of statute.

As The Owner Of Any Forest Lands And Was Not Fighting This Fire As A Public Fireman. (Appellee's Brief pp. 23-29).

At pages 23-29, appellee discusses the history and function of the Forest Service. It does not appear from the record or appellee's brief that these activities differ in any material respect from the conservation, timber development and fire protection practices of such large timber owners as Weyerhaeuser Timber Co., Crown-Zellerbach Co. or Rayonier, Incorporated.

Receipts of the Forest Service from its timber trading are not less impressive than the expenditure made by the Forest Service to protect the timber.²

Appellee again ignores the allegations of the complaint in arguing that the Forest Service was acting as a fire department. Paragraph XIII of the complaint (R. 10) alleges, in part:

"That in fact each of the several owners of extensive timber holdings in said area maintained fire fighting equipment as an incidental phase of its whole operation, and the defendant United States as one of said owners maintained less than an average amount of fire-fighting men and equipment."

B. The Tort Claims Act Contains No Exclusion For Negligence In The Performance Of A Public Function. (Appellee's Brief, p. 29-8).

Appellee here argues that the *Dalehite* case ex-

²U. S. Forest Service Reports show recent timber receipts to be the following:

<i>Fiscal Year</i>	<i>Timber Receipts</i>
1951	\$51,098,565.11
1952	63,722,985.58
1953	69,252,123.90

cepts from the Tort Claim Act negligence in the "performance of a public function." There is no such express exemption in the Act. The specific exemptions of liability for miscarriage of the mails, collection and assessment of taxes, fiscal operations of the Treasury and combatant activities of the military forces in time of war would be wholly unnecessary if the intent of the Act were to exclude "public functions" generally.

The Tort Claims Act is not the first waiver of government immunity. The Public Vessels Act of 1925, 43 Stat, 1112, 46 U. S. C. § 781 imposes the same liability upon the United States for the negligence of public vessels as is imposed by Admiralty Law upon private shipowners. It was passed for the same reasons as the Tort Claims Act—to obviate delay and the inconvenience to Congress in handling each claim by itself; and like the Tort Claims Act, its scope is not to be restricted by a narrow interpretation. *Canadian Aviator Ltd. v. United States*, 324 U. S. 215, 89 L. Ed 901, 65 S. Ct. 639 (1945). The Act contains no express or judicial exemption from liability for negligence in the performance of a "public function."³

Moran Towing & Transp. Co. v. United States, 80 F. Supp. 623, 631, 635 (S. D. N. Y. 1948) held the United States liable for negligent lookout and navigation of a naval vessel "engaged in a military mis-

³ In fact, it appears that the vessel must be engaged in the performance of a "public function" or else the libellant may be relegated to the Suits in Admiralty Act, *Rodriguez v. United States*, 204 F. (2d) 508 (CCA 3rd 1953). Under appellee's theory, proof of performance of a "public function" bars recovery under the waiver of immunity to common law torts whereas it is necessary to allege and prove that a United States vessel is engaged in a "public function" to recover under the waiver of immunity to admiralty torts.

sion" because a civilian vessel would have been so liable. The court refused to read any exception to liability into the act.⁴

This court has held the United States liable for negligence under the Public Vessels Act where the United States had both a public and private duty. In *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (CCA 9th 1945), the court held the United States liable for the loss of cocoa beans because of negligence in loading a navy lighter where it bore the relation of a carrier to the owner of the beans. The United States sought to escape liability by pointing out that the United States was simultaneously discharging a naval duty at the port which was under Japanese air attack at the time. The court disposed of the argument, saying:

" Here was outstanding negligence in the discharge of appellee's Naval duty to resist the enemy in discharging and in loading and ballasting the convoy and of the [its] carrier's duty to appellant. The performance of the Naval duty which is the claimed excuse for the loss of the cocoa beans is thus seen to be infected with negligence at the moment the carrier's obligation attached.⁵

The logical fallacy of appellee's argument that the *Dalehite* case and others established a "public function" exception is pointed out by its concession in

⁴ See also *United States v. The Australian Star*, 172 F. (2d) 472 (CCA 2d 1949) *cert. denied*, 338 U. S. 823, 94 L. Ed. 499, 70 S. Ct. 69, where an escorting naval vessel was held liable for negligence in failing to warn the escorted vessel and another that a collision between them was impending, although it knew of the danger and had the power and authority to prevent it. See also *The Sobreski*, 81 Lloyd's List L. R. 61.

⁵ Followed in *General Cocoa Co. v. United States*, 149 F. (2d) 815, (CCA 9th 1945).

footnote 29 that the Tort Claims Act would cover injuries caused by a Forest Service fire truck fighting a fire.

If anything is doctrinally sanctified in the law of torts, it is the immunity of communities and other public bodies for injuries due to the negligent operation of fire trucks.⁶

Either appellee's concession is the proverbial train ticket "good for this train and day only" or appellee has misinterpreted the *Dalehite* case. In arguing for a new exemption for "public functions" appellee is asking the courts to embark on a wholly uncharted course. Appellants agree with appellee that the governmental-proprietary distinction is not incorporated into the Tort Claims Act, but suggest that the appellee is in error in posing a new and wholly undefined exemption.

" The purpose of the Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else. Unlike other statutes waiving governmental immunity, the Federal Tort Claims Act should be *liberally construed* in order to effectuate the purpose that was intended by its framers. The words 'as a private individual' are not used as words of art or as a limitation, but, rather, in a descriptive manner to indicate that the United States should be liable in the same manner and to the same extent as anyone else." *Gilroy v. United States*, 112 F. Supp., 664, 665-666 (D.C.D.C. 1953) Quoted with approval in *O'Toole et al v. United States*, 206 F.

⁶ Paraphrasing the language of the *Dalehite* case upon which appellee relies.

(2d) 912, 918 (CCA 3rd 1953) (Emphasis supplied.)

C. *The United States Is Liable To Appellants Under Its Fire Protection Agreement.* (Appellee's Brief pp. 38-41.)

In disputing the appellants' position that the immunity of a sovereign state from liability in tort does not extend to an independent contractor doing work for the state, the Government dismisses the authorities advanced by appellants on the ground that they deal with construction work rather than fire protection work. Yet there are two cases contained in appellants' brief (at page 60): *Voltz v. Orange Volunteer Fire Association*, 118 Conn. 307, 172, Atl. 220 (Sup. Ct. 1934) and *Doherty v Oakland Beach Volunteer Fire Company*, 70 R. I. 446, 40 A. (2d) 737 (Sup. Ct. 1944) which do not lend themselves to such distinction. Appellants have found no cases holding otherwise, nor does *McQuillian on Municipal Corporations* in its section on this subject furnish any authority to the contrary.⁷

D. *Appellee Cannot Avoid Private Duties By Alleging Negligence In The Performance Of A Public Duty.* (Appellee's Brief, pp. 42-45.)

Appellee again fails to meet the issue of the liability of a private landowner in Washington. Nothing is clearer than the duty of a landowner in Washington to fight a fire on his lands, however it originates. It is both a common law and statutory duty.⁸

It is appellants' position that the Forest Service had no duty as a public fire department, but was

⁷ See *McQuillian on Municipal Corporations*, page 371, §53.82.

⁸ See cases and statutes cited at pp. 36-39 and 55-57 of Appellants' Brief.

at all times performing the duties of any private landowner. Even assuming, however, that the Forest Service was also a fire department, it would have, with respect to its own lands at least, a dual duty. Negligence in the performance of the public duty would not exculpate it from liability for negligence in the performance of the private duty. *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (CCA 9th 1945). *Hillstrom v. City of St. Paul*, 134 Minn. 451, 159 N. W. 1076 (1916).

In arguing that the United States as a landowner has fulfilled its private duty by maintenance of a public fire department, appellee implies that the United States had no one charged with performance of the former duty. A private landowner who fails to take steps in fighting a fire on his own lands, although he had the means to do so, would be liable to third persons damaged by the escape of the fire, notwithstanding any negligence of the public bodies that might also have occurred. It is not due care for a Washington timber owner to rely exclusively upon a public fire department. *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174 and *Wood & Iverson, Inc. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712.

While appellee appears to regard these cases as inapplicable, in both the court held the landowner liable for the negligence of a public official performing a duty for the landowner which was also an official and public duty. Regardless of any fiction as to what "capacity" the state fire warden acted in the *Galbraith* case, he was performing a duty owed by a landowner at the request of the landowner. The particular act of burning slash was also a public duty which the law required be performed in his official capacity. In the *Wood & Iverson* case,

the particular negligence of the fire wardens in starting a fire to burn slashings was a failure to require the cutting of snags — a duty the court held was mandatory “upon the Forestry Department and upon the owner or possessor of lands.” In these two cases, the Washington courts expressly held that the landowner was liable for negligent acts of public firemen. So, here, District Ranger Fleece was performing a duty of the United States as a landowner in fighting a fire occurring on its land, at its request and cost. Whether or not, at other time and places, he might wear a public fireman’s hat, he was then performing a non-delegable private duty of the United States. The United States is liable for his negligent acts and omissions.

It appears from the complaint that the initial fire occurred on the government owned and controlled right of way. It is alleged that appellee was negligent in permitting it to escape to a larger area. In this second stage, the fire was exclusively on United States land and it is alleged that it could and should have been extinguished at that point; but it was negligently permitted to escape again. Finally, it is alleged that the fire was again controlled by appellee, could and should have been extinguished but was allowed to smoulder for 40 days and escape again.

Since a landowner is under a duty to fight a fire occurring on his own lands and is required to pursue it if necessary, regardless of how it originates, appellee does not suggest that this is any reason for distinguishing between a fire that burns off an easement and onto unencumbered land but was at all times capable of being extinguished and a fire that is ignited directly upon the unencumbered land. In this case, appellee’s argument would lack even su-

perforated substance if the spark from the railroad had landed just outside the easement instead of between the rails.

The duties of timber owners to protect the wealth of the state does not depend upon any such vagary of wind or width of right of way.

Finally, appellee concludes by reverting to its initial error that appellee was only a helpless owner of "a reversionary interest" in the right of way, contrary to fact and the allegations of the complaint.

CONCLUSION

This is an appeal from a judgment granting appellee's motion for judgment on the pleadings. The allegations of the complaint are deemed fully established and are to be construed and doubts resolved in favor of appellants. Appellee's brief starts with an erroneous assumption that appellee was a servient owner of land subject to an easement granted by statute and cites cases construing the statute. Neither the statute nor the cases are relevant to the facts or the pleadings.

Appellee next announces a rule of law and cites cases governing the burden of repair to an easement as between dominant and servient owners. Neither the rule of law nor the cases are relevant to the facts or the pleadings.

Continuing with doctrine and cases removed from the issues, appellee cites cases to the effect that a landowner is not barred by contributory negligence from recovering damage occasioned by his neighbor's negligent use of land—applicable perhaps to appellee's cross-complaint against the railroad, but not relevant in the matter before the court.

At the same time appellee has ignored the allegations of the complaint showing it had a right to control the operation of the railroad as well as the right to control the condition of the premises, and has also ignored cases declaring the liability of private persons and municipal corporations to third persons in like circumstances.

The appellee would compound confusion by adding to the Tort Claims Act a new exception entitled "public function"—an exception without basis in logic or precedent. This new exception is its only answer to the distinctions pointed out between the

case at bar and the Dalehite case upon which the District Court relied and the many cases holding municipal corporations liable for negligence in permitting fire to escape from their own lands. It is a theory borne of necessity. It ignores the allegations of the complaint that appellee, like other adjacent timber owners, maintains fire-fighting equipment "as an incidental phase of its whole operation." (R. 10).

Appellee is not entitled to avoid a trial upon the allegations of the complaint by any argument that erroneously assumes facts and rules of law inapplicable to the action. If appellants' authorities would not justify a trial against a similarly situated private timber owner, appellee could have met them without resorting to unjustified assumptions and inapplicable cases.

No doctrine of public policy, or fear of extending the Tort Claims Act to new or novel causes of action justifies frustrating the purpose of that Act by refusing to apply to the United States the well-defined and long-standing duties that govern owners of Washington timber-land.

It is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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